



## Panel: Comparative Judicial Practice

Honorable Peter J. Messitte

### Overview

#### Transnational Discovery – Incoming Requests

##### A) Statute: 28 U.S.C. § 1782

Upon request of “ foreign or international tribunal” or “ any interested person,” district court may order any person within the district “ to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal”

##### B) Features

- 1) Not strict and formalistic
- 2) Request may be sent directly to district court
- 3) Covers non-parties as well as parties
- 4) Covers criminal as well as civil proceedings
- 5) Statute “ authorizes, but does not require, a federal district court to provide assistance.” *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004)

##### C) What is a “ foreign or international tribunal” ?

- 1) Objective body with proof-taking adjudicative powers
- 2) Includes conventional tribunals, investigating magistrates, administrative and arbitral tribunals, quasi-judicial agencies

D) Who is “ any interested person” ?

- 1) Includes litigants, government officials
- 2) Any person possessing reasonable interest in matter. Id. at 255.
- 3) Applies to international organizations, e.g. European Commission of the European Communities, as well as foreign countries. Id. at 256.

E) What are “ proceedings” ?

- 1) Not just pending adjudicative proceedings
- 2) Not just imminent adjudicative proceedings. Id. at 258.
- 3) Also proceedings “ within reasonable contemplation.” Id. at 259.

F) How extensive is district court’ s discretion?

- 1) Court has broad discretion
- 2) However, it may not require:
  - a) That requested discovery be available under foreign law before it is allowed in the U.S. Id. at 260-263.
  - b) That U.S. law would allow discovery in domestic proceeding analogous to foreign proceeding. Id. at 263.
  - c) That requesting party seek discovery in foreign court first. See *Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), cert. denied 113 S. Ct. 179 (1992).

- d) That requested discovery, i.e. evidence, be admissible under foreign proceeding before it is allowed in U.S.
- 3) Per Intel Corp., court otherwise ought to consider these non-exhaustive factors:
  - a) Who is making the request (non-participant in foreign proceeding may have greater need than participant because foreign tribunal may be able to order production of evidence itself)
  - b) Nature of tribunal or other interested party making request
  - c) Character of proceedings abroad
  - d) Receptivity of foreign government or court or agency abroad toward U.S. federal court judicial assistance
  - e) Possibility that requesting party is attempting to circumvent proofgathering restrictions of foreign tribunal, burdensomeness of request, fishing expedition, privacy concerns, harassment
- 4) District court may impose restrictions on request
  - a) Limit inquiry into protected areas, e.g. usual privileges, business confidentiality
  - b) Impose other restrictions as may be available under Federal Rules of Civil Procedure